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No. 941

FILED
✓ APR 19 1943

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1942.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY,
Petitioner,

v.

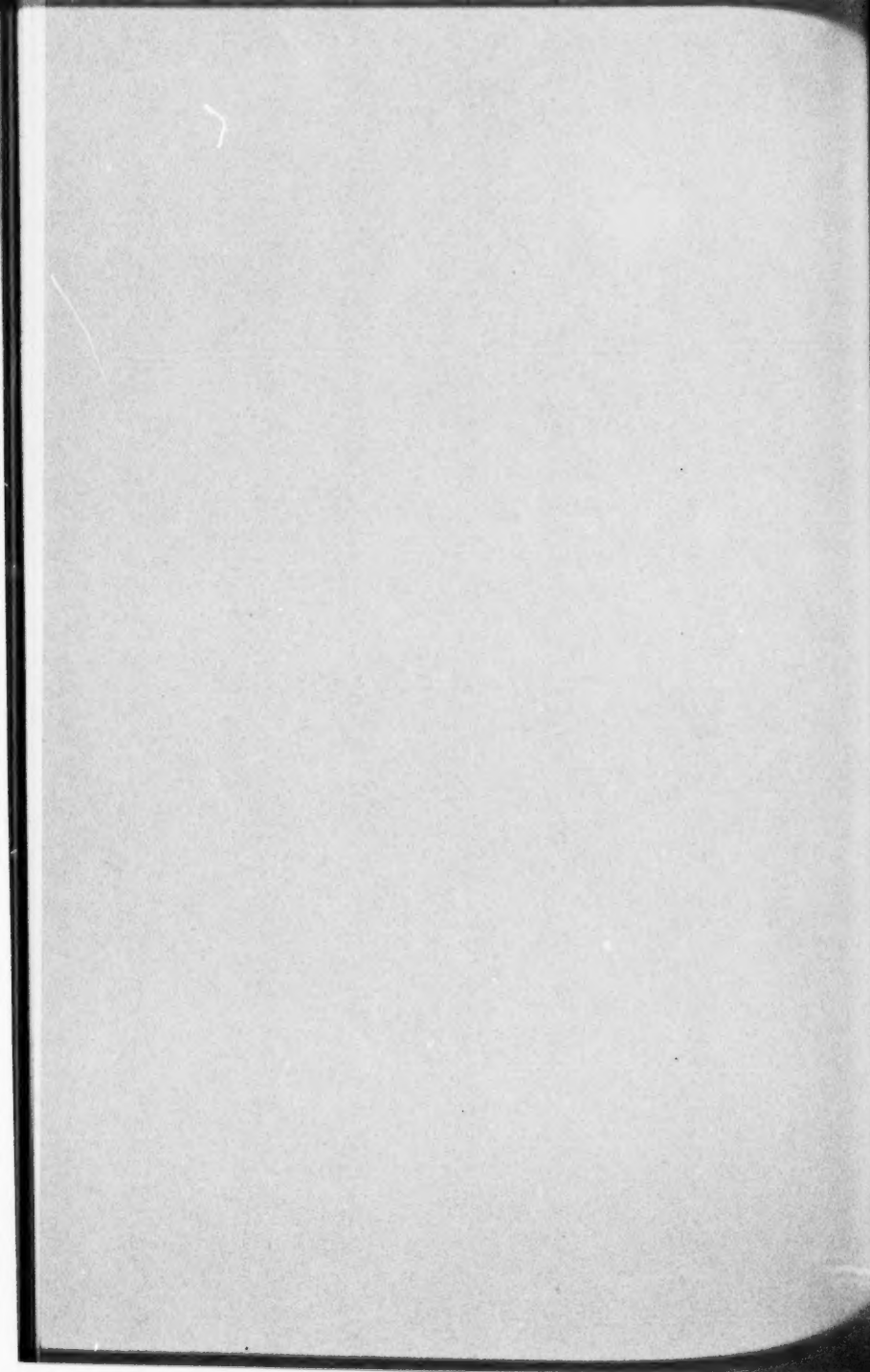
THOMAS J. CASEY, TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

GARALD K. RICHARDSON,
*Attorney for JOHN HANCOCK MUTUAL
LIFE INSURANCE COMPANY, Petitioner.*



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THOMAS J. CASEY, TRUSTEE,

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PETITION FOR WRIT OF CERTIORARI.

Summary of Matters Involved.

This petition seeks a review of a decision of the Circuit Court of Appeals for the First Circuit dismissing the petitioner's appeal from the various orders and findings of the District Court contained in an "Order Approving Trustee's Petition for Injunction and Findings of Fact" entered September 16, 1942 (Record, pages 21 to 24), upon the trustee's petition for an injunction (Record, page 7), and an "Order for Turn Over" dated September 17, 1942 (Record, page 41), entered on trustee's petition for turn over (Record, page 25), and from the orders denying mo-

tions to dismiss the petition for injunction and petition for turn over.

On November 1, 1940, Carlton Hotel, Inc., hereinafter referred to as the "debtor," purchased from John Hancock Mutual Life Insurance Company the premises known as the Hotel Buckminster, and certain personal property contained therein, for \$360,000, giving as part of the purchase price a mortgage note (Record, page 28) in the sum of \$345,000 and as security for said note conveyed in mortgage said real and personal property and assigned the existing leases, which assignment included the Yankee Network lease hereinafter referred to (Record, pages 30, 35 and 39).

On August 1, 1942, the debtor failed to make the payments on the mortgage note provided to be made on that date, and thereafter on August 5, 1942, the debtor filed its petition under the provisions of Chapter 10 of the Bankruptcy Act, alleging the existence of the aforementioned real and personal property mortgages and debt and that "the terms and conditions of said mortgage are burdensome and in need of adjustment; the mortgagee threatens to foreclose its mortgage."

On August 12, 1942, the mortgagee for the aforementioned breach of condition of the said mortgages took possession of the property conveyed thereby and duly recorded evidence of its possession (Respondent's Exhibit A, page 42), and thereafter continued in possession of the real and personal property conveyed by said mortgages.

On August 17, 1942, the United States filed a petition for condemnation and obtained an order for possession upon its petition condemning for use for military purposes the real estate conveyed by said mortgage, excepting therefrom that portion of the premises covered by the lease to the Yankee Network herein referred to.

On August 18, 1942, an order was entered approving the debtor's petition for reorganization and Thomas J. Casey was appointed trustee of the debtor.

On August 31, 1942, the trustee filed a petition for injunction alleging that the real estate and personal property conveyed by said mortgages are the principal and only assets of any real value owned by the debtor and "that the foreclosing of said mortgages, will deprive the general unsecured, as well as the secured creditors of the debtor corporation of any possibility of recovery of any portion of the debts due them from the debtor, that the foreclosing of said mortgages is unfair, and unjust, and unwarranted, and is devoid of any equity," pursuant to which petition the court, on September 16, 1942, upon consideration of the pleadings and statements of facts presented by counsel, issued an injunction (1) restraining the mortgagee from "proceeding with the foreclosure proceedings brought to foreclose the mortgages" on the real and personal property and restraining the mortgagee from exercising the power of sale contained in the mortgages, (2) ordering the mortgagee to relinquish possession of the said real and personal property covered by said mortgages, and (3) ordering the mortgagee to surrender said real and personal property to the trustee, and on September 17, 1942, the court ordered the mortgagee to turn over to the trustee \$1100 collected from the Yankee Network as rent for the month of September, 1942 (Record, page 41).

The petitioner by its appeal to the Circuit Court of Appeals challenged the orders of the District Court on the grounds that they were based upon an improper construction of Title 11, Chapter 10, United States Code, 1940 Edition (the Chandler Act), and if so construed, the Chandler Act was invalid in that it violated the Fifth Amendment of the Constitution.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the United States Code, 1940 Edition, Title 11, Section 47C, and Section 240, Judicial Code as amended, United States Code, 1940 Edition, Title 28, Section 347.

The Questions Presented.

1. Where, because of default, a mortgagee under a Massachusetts statutory form mortgage had, prior to and at the time of filing of the debtor's petition for reorganization, the title to and the right to the possession of the mortgaged property, should the provisions of Chapter 10 of the Bankruptcy Act be construed to

- (a) take from the mortgagee and transfer to the trustee the right to possession or the possession taken and held by the mortgagee after the filing of the petition;
- (b) authorize the court to restrain the mortgagee from exercising the power of sale contained in the mortgage;
- (c) authorize the court to order the mortgagee to turn over to the trustee the rents collected from a tenant;
- (d) authorize the court to order the mortgagee, which is also an assignee under a valid assignment of leases, to turn over to the trustee the rents collected by virtue of such assignment?

2. If Chapter 10 of the Bankruptcy Act is so construed, does it violate the Fifth Amendment of the Constitution of the United States?

Reasons Relied on for the Allowance of the Writ.

While there have been numerous decisions under prior Bankruptcy Acts upon the precise points here raised, this is the first occasion on which they have been raised under the Chandler Act and here for the first time are presented questions of the first importance relating to the proper interpretation of that Act which should be passed upon by this court, not only for the benefit of the parties here involved, but for the benefit of the parties in the many pending and future petitions for reorganization under Chapter 10 and for the benefit of the many banks, insurance companies and persons holding mortgages in those jurisdictions where a mortgage is a conveyance of title to the property rather than a lien.

If the Chandler Act, unlike prior Bankruptcy Acts, is to be construed to extend the jurisdiction of the Bankruptcy Court to the administration of property to which the bankrupt has neither the title nor the right to the possession, there is here presented a question of the validity of that Act on constitutional grounds involving a conflict between that Act and the Fifth Amendment of the Constitution which should be determined by this court.

If the Chandler Act has not thus extended the jurisdiction of the Bankruptcy Court, the decision of the Circuit Court of Appeals would appear to be in conflict with the decisions of this court in the following cases:

Tuttle v. Harris, 297 U.S. 225;

Duparquet v. Evans, 297 U.S. 216;

Louisville Stock and Land Bank v. Radford,
295 U.S. 555;

and with the decision of the Circuit Court of Appeals for the Third Circuit in—

Continental Bank and Trust Co. of New York v. Nineteenth and Walnut Streets Corporation, 79 Fed. (2d) 284;
Reighard v. Higgins Enterprises, Inc., 90 Fed. (2d) 569;

and with a decision of the Circuit Court of Appeals for the Seventh Circuit:

In re Frances E. Willard National Temperance Hospital, 82 Fed. (2d) 804;

and with a decision of the Circuit Court of Appeals for the First Circuit:

In re Ginestri, 15 Fed. (2d) 764;

and with the decision of the Supreme Judicial Court of Massachusetts in—

Harlow Realty Company v. Cotter, 284 Mass. 68.

The decision of the Circuit Court of Appeals involved an important question of Massachusetts law relating to the title and right to possession of real and personal property and was decided in a way in conflict with decisions of the Supreme Judicial Court of Massachusetts in—

Hall v. Bliss, 118 Mass. 554;
Landon v. Emmons, 97 Mass. 37 (personal property);
City of Boston v. Quincy Market Cold Storage and Warehouse Company, 1942 Massachusetts Advance Sheets, page 1867 (decided December 30, 1942)—

to the effect that "the mortgagee has the legal title to the mortgaged real estate, subject, however, to defeasance, and in this aspect the mortgagee is the owner of such real estate" (quotation is from said last-mentioned case, at page 1877).

Upon the question involving the assignment of rents, the decision of the Circuit Court of Appeals is in conflict with the decision of a District Court in—

In re H. K. Porter, 24 Fed. Supp. 767.

The Circuit Court of Appeals has improperly applied the decision of this court in—

*Continental Illinois Bank and Trust Company
v. Chicago, Rock Island and Pacific Railway
Company*, 294 U.S. 648—

which improper application should be corrected.

In the interest of brevity your petitioner does not at this time set forth all the points which it urged at the argument on appeal of this cause to the Circuit Court of Appeals, but in order to comply with the rule of this court requiring that all issues upon which decision is requested be presented in the petition for certiorari, the petitioner here refers to and incorporates in this petition all of the matters presented in the "Statement of the Points on Which Appellant Intends to Rely Upon Appeal" (Record, page 44 *et seq.*) with the same force and effect as if herein set out in full.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals commanding that court to certify and to

send to this court for its review and determination on a day certain to be therein named a transcript of the record and proceedings therein and that the decree of the Circuit Court of Appeals for the First Circuit and the District Court for the District of Massachusetts be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper.

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

By its Attorney,

G. K. RICHARDSON.





Supreme Court of the United States.

OCTOBER TERM, 1942.

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COMPANY,

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THOMAS J. CASEY, TRUSTEE,

Respondent.

BRIEF ON PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The memorandum of decision for injunction entered in the District Court September 16, 1942, is set forth in the record at page 42. The orders of the District Court dated September 16, 1942, appealed from are set forth in the record at pages 22 to 24, inclusive, and the order for turn over dated September 17, 1942, appealed from is set forth in the record at page 41 and the opinion of the Circuit Court of Appeals for the First Circuit dated March 1, 1943, is set forth in the record at pages 51 to 53, inclusive.

II.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the Bankruptcy Act, United States Code, 1940 Edition, Title 11, Section 47C, and under Section 240 of the Judicial Code as amended, United States Code, 1940 Edition, Title 48, Section 347.

III.

Statement of the Case.

On November 1, 1940, Carlton Hotel, Inc., hereinafter referred to as the "debtor," purchased from John Hancock Mutual Life Insurance Company the premises known as the Hotel Buckminster, and certain personal property contained therein, for \$360,000, giving as part of the purchase price a mortgage note (Record, page 28) in the sum of \$345,000, and as security for said note conveyed in mortgage said real and personal property and assigned the existing leases, which assignment included the Yankee Network lease hereinafter referred to (Record, pages 30, 35 and 39).

On August 1, 1942, the debtor failed to make the payments on the mortgage note provided to be made on that date and thereafter on August 5, 1942, the debtor filed its petition under the provisions of Chapter 10 of the Bankruptcy Act, alleging the existence of the aforementioned real and personal property mortgages and debt and that "the terms and conditions of said mortgage are burdensome and in need of adjustment; the mortgagee threatens to foreclose its mortgage."

On August 12, 1942, the mortgagee for the aforementioned breach of condition of the said mortgages took possession of the property conveyed thereby and duly recorded evidence of its possession (Respondent's Exhibit A, page 42) and thereafter continued in possession of the real and personal property conveyed by said mortgages.

On August 17, 1942, the United States filed a petition for condemnation and obtained an order for possession upon its petition condemning for use for military purposes the real estate conveyed by said mortgage excepting therefrom that portion of the premises covered by the lease to the Yankee Network herein referred to.

On August 18, 1942, an order was entered approving the debtor's petition for reorganization and Thomas J. Casey was appointed trustee of the debtor.

On August 31, 1942, the trustee filed a petition for injunction alleging that the real estate and personal property conveyed by said mortgages are the principal and only assets of any real value owned by the debtor and "that the foreclosing of said mortgages, will deprive the general unsecured, as well as the secured creditors of the debtor corporation of any possibility of recovery of any portion of the debts due them from the debtor, that the foreclosing of said mortgages is unfair, and unjust, and unwarranted, and is devoid of any equity," pursuant to which petition the court, on September 16, 1942, upon consideration of the pleadings and statements of facts presented by counsel, issued an injunction (1) restraining the mortgagee from "proceeding with the foreclosure proceedings brought to foreclose the mortgages" on the real and personal property and restraining the mortgagee from exercising the power of sale contained in the mortgages, (2) ordering the mortgagee to relinquish possession of the said real and personal property covered by said mortgages, and (3) ordering the mortgagee to surrender said real and per-

sonal property to the trustee, and on September 17, 1942, the court ordered the mortgagee to turn over to the trustee \$1100 collected from the Yankee Network as rent for the month of September, 1942 (Record, page 41).

The petitioner by its appeal to the Circuit Court challenged the orders of the District Court on the grounds that they were based upon an improper construction of Title 11, Chapter 10, United States Code, 1940 Edition (the Chandler Act), and if so construed, the Chandler Act was invalid in that it violated the Fifth Amendment of the Constitution.

IV.

Specifications of Errors.

The Circuit Court of Appeals erred—

1. In construing Sections 256 and 257 of the Chandler Act to authorize the District Court to order the mortgagee in possession of the premises after default to turn over to the trustee the possession of the premises and the rents collected therefrom.

2. In construing Sections 256 and 257 of the Chandler Act to authorize the court to order the mortgagee, the holder of a valid assignment of leases, to turn over to the trustee the rents collected by virtue of such assignment.

3. In construing Sections 111 to 116, inclusive, of the Chandler Act to authorize the orders staying the mortgagee from foreclosing its mortgage by the exercise of the power of sale contained in said mortgage.

4. In ruling that "the rights of the mortgagee under its Massachusetts form of mortgage to take possession and foreclose on breach of condition were not impaired, from a constitutional point of view, by the exercise of the authority conferred by the Bankruptcy Act. The exercise of those

rights were suspended for the time being for the purposes of the Act, the constitutionality of which cannot now be doubted."

(5) In ruling that the property (conveyed by the mortgages) was *in custodia legis* as of the date of the petition.

For a further statement of the errors alleged to have been committed by the District Court and in which the Circuit Court of Appeals by its opinion and order affirming various orders of the District Court erred see "Statement of the Points Upon Which the Appellant Intends to Rely on Appeal" (Record, pages 44 to 48, inclusive).

V.

Argument.

This is the first occasion that has been presented for the determination of this court of the application of the Chandler Act to the rights of mortgagees in title jurisdictions to foreclose or to possession.

Under prior Bankruptcy Acts there existed a well-founded distinction between the application of the Bankruptcy Act to the rights of mortgagees in lien jurisdictions and in title jurisdictions.

In lien jurisdictions and in some title jurisdictions it was necessary for the mortgagee to bring court proceedings in order to foreclose his mortgage, change the title from mortgagor to mortgagee, obtain possession of the premises or cut off the equity of redemption. The filing of a petition under the Bankruptcy Act by staying the court proceedings prevented foreclosure of the mortgage, change in title, change in possession and the cutting off of the equity of redemption. But, in such title jurisdictions as Massachusetts, the stay of court proceedings did not operate to prevent the mortgagee from taking possession or

from selling under the power of sale contained in the mortgage.

In re Ginestri, 15 Fed. (2d) 764 (1926); affirming 12 Fed. (2d) 456.

Harlow Realty Company v. Cotter, 284 Mass. 68 (1933).

Hall v. Bliss, 118 Mass. 554 (1875).

Harvey v. Smith, 179 Mass. 592 (1901).

Massachusetts Hospital Life Insurance Company v. Wilson, 10 Met. 126 (1845).

Under Section 77B of the Bankruptcy Act, 48 Stat. 911, 912, the scope of the Bankruptcy Act was extended, but in *Tuttle v. Harris*, 297 U.S. 225 (1936), it was determined that Section 77B of the Bankruptcy Act did not authorize the transfer of possession to the trustee from a mortgagee who, after condition broken, is, under the law of Illinois, the owner and as such is entitled as of right to the possession.

The distinction between results obtained in title jurisdictions from those obtained in lien jurisdictions persisted under the amendments to the Bankruptcy Act known as Sections 77 and 77B.

For illustrations involving legal title see—

Tuttle v. Harris, 297 U.S. 225 (1936).

Continental Bank and Trust Company of New York v. Nineteenth and Walnut Streets Corporation, 79 Fed. (2d) 284 (1935).

In re H. K. Porter, 24 Fed. Supp. 767 (1938).

Reighard v. Higgins Enterprises, Inc., 90 Fed. (2d) 569 (1937).

In re Frances E. Willard National Temperance Hospital, 82 Fed. (2d) 804 (1936).

And for illustrations involving liens see—

Continental Illinois Bank and Trust Company v. Chicago, Rock Island and Pacific Railway Company, 294 U.S. 648 (1939).

In re Franklin Gardens Apartments, 47 American Bankruptcy Reports (N.S.) 376, 124 Fed. (2d) 451 (1936).

It is submitted that the District Court and the Circuit Court of Appeals for the First Circuit have in this case gone far beyond the scope permitted to Bankruptcy Courts under prior bankruptcy laws. The question arises as to whether or not upon proper interpretation of the Chandler Act such decrees and orders are authorized. The District Court and the Circuit Court of Appeals in its opinion have found the authority to order the transfer of possession of the property and to order the mortgagee to turn over to the trustee the rents collected by it in Sections 256 and 257 of the Act (52 Stat. 902, United States Code, Title 11, Chapter 10, Sections 656 and 657; Record, page 52). Chapters 256 and 257 are a part of Article XIV of the Act, which article is entitled "Prior Proceedings" (United States Code, Title 11, subchapter XIV). Article XIV as a whole relates to court proceedings instituted prior to the filing of the petition for reorganization. If construed in connection with the context of Article XIV, the last sentence of Section 257, "The trustee or debtor in possession shall also have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage," may be limited to trustees under a trust deed or mortgagees who are in possession as a result of pending court proceedings, as in—

Tuttle v. Harris, 297 U.S. 225.

If such is the proper construction, the court below has misapplied that section in the present case. In the present case there were no prior court proceedings, and under the laws of Massachusetts none were necessary.

Also, a question arises as to the meaning of the words "property of the debtor" as used in that sentence. Under Massachusetts laws the mortgagee is the owner even before default; that is to say, the mortgage conveys the title to the mortgagee.

City of Boston v. Quincy Cold Storage and Warehouse Company, 1942 Massachusetts Advance Sheets, pages 1867, 1877 (December 30, 1942).

Do the words "property of the debtor" include property to which he has neither the title nor right to possession?

If the aforesaid last sentence of Section 257 of the Chandler Act is limited in its application to the context of Article XIV, or if proper limitations are placed on the meaning of the words "property of the debtor" as used in that sentence, no constitutional question arises, but as applied by the District Court and the Circuit Court of Appeals, the Act has, to paraphrase the language of this court in—

Louisville Bank v. Radford, 295 U.S. 555, 601—

taken from the mortgagee (bank) and given to the trustee (Radford) rights in specific property which are of substantial value. A question of the validity of the Act as violating the Fifth Amendment of the Constitution is thus presented.

The District Court and the Circuit Court of Appeals have found authority for staying the foreclosure by restraining the exercise of the power of sale in Sections 111-

116 of the Chandler Act, which sections are part of Article III, defining the jurisdiction and power of the court.

Admitting for the purposes of this brief that, upon proper cause shown, the Bankruptcy Court has power to restrain such sale, does the court, merely because of the fact of the filing or approval of a petition for reorganization, have authority to stay the foreclosure under the power of sale contained in the mortgage or to order the mortgagee to surrender its possession to the trustee in neither of which is involved any court proceedings or any act to enforce a lien? (Section 113.)

Under Massachusetts law a mortgagee may foreclose its mortgage, that is, cut off the equity of redemption by court action (General Laws, Chapter 244, Sections 3 to 5, inclusive) or by exercise of the power of sale contained in the mortgage (General Laws, Chapter 244, Sections 14 to 17, inclusive), and may enter (by General Laws, Chapter 244, Section 1) and continue the possession until judgment or sale.

Under the Chandler Act as well as under prior bankruptcy laws, foreclosure by court proceeding is and was stayed. Under prior bankruptcy laws foreclosure by exercise of the power of sale and the right to enter were not stayed.

In re Ginestri, 15 Fed. (2d) 764 (1926).

Hall v. Bliss, 118 Mass. 554 (1875).

Harlow Realty Company v. Cotter, 284 Mass. 68 (1933).

It is of great importance that the question whether the Chandler Act stays such foreclosures and rights to enter and remain in possession be authoritatively determined. But more broadly there is involved the fundamental question of the jurisdiction of the Bankruptcy Court to admin-

ister the property and affairs of persons other than the debtor. In the present case the mortgagee was the owner of the property involved, much the same as if it were the vendor under a conditional sale agreement. It had title, and after default right to possession, the actual possession and, by virtue thereof and of the assignment of The Yankee Network, Inc., lease, stood in the position of landlord to The Yankee Network, Inc. The debtor's property interest was merely the right to obtain title and possession upon payment of the mortgage debt; that is, a right of redemption.

Having jurisdiction of the debtor and his right of redemption, is the jurisdiction of the Bankruptcy Court limited to the debtor and his property (the right of redemption), or does it encompass the property, rights, interests and relationship of others with which the affairs and property of the debtor may be involved, touch or concern?

Is the Chandler Act to be construed to give authority to administer the property and affairs of persons other than the debtor when the debtor has a property right or interest therein?

If so construed, does it violate the Fifth Amendment of the Constitution?

Since the precise questions here presented have not been heretofore decided under the Chandler Act, and all of the cases cited in your petitioner's petition for a writ of certiorari with which it is alleged the decision sought to be reviewed is in conflict arose under prior Bankruptcy Acts, it may be denied that any conflict exists; but such denial must presuppose that the Chandler Act has so broadly extended the jurisdiction and power of the Bankruptcy Court that the prior decisions are no longer of use or effect. Such a denial lends emphasis to the necessity for an authoritative decision by this court upon the Chandler Act.

The allegations that there exists a conflict with the decisions cited in the petition are based upon the contention that there has been no such broad extension of jurisdiction and power by the Chandler Act, and if there was such an extension, it violates the Fifth Amendment of the Constitution.

In *Tuttle v. Harris*, 297 U.S. 225, and *Duparquet v. Evans*, 297 U.S. 216, it was decided that the words "equity receiver" as used in the Bankruptcy Act were not to be broadly construed to encompass a receiver in mortgage foreclosure proceedings and that the Bankruptcy Court was without authority to transfer possession to the trustee from a mortgagee who, after condition broken, is the owner of a legal estate and as such is entitled to possession. Here it is contended that the words "mortgage foreclosure proceedings" as used in the Act are limited to court proceedings and are not to be broadly construed to include foreclosure by the exercise of power of sale or to divert possessions of the title holder, and we thus have a situation where, contrary to the precedent of *Tuttle v. Harris*, the court has assumed to transfer to the trustee the possession of a mortgagee who had the legal title to the premises and after condition broken had the right to possession.

The decision of the Circuit Court of Appeals is in conflict with the decision in *Louisville Bank v. Radford*, 295 U.S. 555, in so far as that decision is authority for the proposition that the right to the possession of specific property is an interest in property protected by the Fifth Amendment of the Constitution and a Bankruptcy Act so applied as to transfer that right to possession is void. The decisions of the various Circuit Courts of Appeals with which it is alleged the decision sought to be reviewed is in conflict are all cases arising in title jurisdictions where the mortgagee is in possession of the premises by virtue of his

title and as a result of a breach of condition by which the mortgagee acquired the right to possession. All arose prior to the Chandler Act and all held it was improper to transfer the possession of the mortgaged premises to the trustee. Unless the Chandler Act is construed to authorize such transfer of possession and as so construed is not void as violating the Fifth Amendment of the Constitution, there exists such a conflict as was once determined by the decision in *Tuttle v. Harris*, 297 U.S. 225, but which now, by reason of the changes in the bankruptcy law made by the Chandler Act, has again arisen to confuse the bench and bar, the holders of mortgages in title jurisdictions and litigants in reorganization proceedings.

The allegations in the petition for a writ of certiorari that the decision sought to be reviewed is in conflict with decisions of the Supreme Judicial Court of Massachusetts upon questions of local law relating to title and right to possession of mortgaged property are based upon the proposition that, like prior Bankruptcy Acts, the Chandler Act is not to be construed to give jurisdiction to administer the property and affairs of persons other than the debtor, and that, by the decisions cited, the property conveyed by the mortgage deed after condition broken is the property of the mortgagee to which the mortgagee has title, the right to possession and the power to sell, all of which property, right and power of the mortgagee are not affected by the mortgagor's (debtor's) petition for reorganization, since the Bankruptcy Court obtained jurisdiction only of the property which the debtor had, *i.e.*, the right of redemption.

The improper application of the decision of this court in—

*Continental Illinois National Bank and Trust
Company v. Chicago, Rock Island and Pacific
Railway Company*, 294 U.S. 648—

to this case lies in the assumption that, since that case held the former Section 77 of the Bankruptcy Act did not violate the Fifth Amendment, the Chandler Act does not violate it, and in the assumption that, because the temporary restraining of the exercise of a power of sale of securities by a pledgee was authorized, an order for the transfer of the possession of the owner of the property and income therefrom to the trustee was likewise authorized. Furthermore, a persuasive cause for the restraining order in the Chicago Rock Island case was that such immediate sale not only would transfer the title which the debtor had to the securities at the time of filing the petition but would increase the number and amount of claims against the debtor to the serious embarrassment of the administration of the reorganization proceedings. Such a restraining order as was determined not to be violative of the Constitution is not analogous to restraining the exercise of a power of sale under a Massachusetts mortgage where legal title to such property was in the mortgagee and the title to be transferred to the purchaser was not a title or estate which the debtor had at the time of the filing of the petition. True, in the Chicago, Rock Island case the court made an analogy between the restraint of the exercise of the power of sale granted in that case to the stay of foreclosure proceedings and foreclosure sales, but the court was there referring to the decisions in so-called lien jurisdictions and those title jurisdictions where court proceedings were necessary to foreclose and sell, and did not have in mind or intend to cast any doubt upon the correctness of its own decisions and the decisions in the state and federal courts in Massachusetts and other so-called title jurisdictions.

There was not involved in the Chicago Rock Island case any transfer of possession from the pledgee to the trustee of property or the income therefrom, only the temporary stay of the exercise of a power to sell pledged securities.

Can it be said that to deprive a mortgagee of the possession of the mortgaged premises, his right to the possession thereof and his right to collect rents therefrom is so analogous to the circumstances of the Chicago Rock Island case that the principle of that case is applicable to the situation here involved?

Summary.

Because—

(1) there exists a question as to the interpretation of Chapter 10 of the Bankruptcy Act of great importance and of wide interest fundamental to the jurisdiction and proper administration of proceedings for reorganization of corporations where the interest of mortgagees in title jurisdictions are involved, and

(2) there exists a serious question as to the constitutionality of the Chandler Act as applied in the present case, and

(3) there exists a confusion and diversity of opinion as to the proper interpretation of the Chandler Act evidenced by the apparent conflict of opinion of the various Circuit Courts of Appeals, and

(4) there has been a misinterpretation or improper application of decisions of the Supreme Court by the Circuit Court of Appeals in the present case—

there is presented a case which ought to be reviewed by this Honorable Court.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the errors of the Circuit Court of

Appeals for the First Circuit may be corrected and in order that there may be an authoritative decision on the scope of the jurisdiction and power of the Bankruptcy Court under the Chandler Act and in order that there may be an authoritative decision as to the constitutionality of the Chandler Act as applied to the rights of mortgagees in title jurisdiction and to such an end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

Respectfully submitted,

by GARALD K. RICHARDSON,

Attorney for JOHN HANCOCK MUTUAL

LIFE INSURANCE COMPANY, *Petitioner.*

Appendix.**JURISDICTION OF PETITION FOR WRIT OF CERTIORARI.**

United States Code, 1940 Edition, Title 11, Section 47(e):

The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. (July 1, 1898, ch. 541, § 24, 30 Stat. 553; Feb. 13, 1925, ch. 229, §§ 1, 5, 13, 43 Stat. 936, 939, 941; May 27, 1926, ch. 406, § 9, 44 Stat. 664; June 7, 1934, ch. 426, 48 Stat. 926; June 22, 1938, ch. 575, § 1, 52 Stat. 854.)

Judicial Code, Section 240, United States Code, 1940 Edition, Title 28, Section 347 (a):

In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. (Mar. 3, 1911, ch. 231, § 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926.)

Pertinent Sections of the Chandler Act.

Sections 256 and 257 (United States Code, 1940 Edition, Title 11, Sections 656 and 657):

§ 256. A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States or of any State in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made. (July 1, 1898, ch. 541, § 256, as added June 22, 1938, ch. 575, § 1, 52 Stat. 902.)

§ 657. The trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession, the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee or debtor in possession shall also have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage. (July 1, 1898, ch. 541, § 257, as added June 22, 1938, ch. 575, § 1, 52 Stat. 902.)

Sections 111 to 116 (United States Code, 1940 Edition, Title 11, Sections 511 to 516):

§ 511. Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located. (July 1, 1898, ch. 541, § 111, as added June 22, 1938, ch. 575, § 1, 52 Stat. 884.)

§ 512. Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter,

shall be the same as in a bankruptcy proceeding before adjudication. (July 1, 1898, ch. 541, § 112, as added June 22, 1938, ch. 575, § 1, 52 Stat. 884.)

§ 513. Prior to the approval of a petition, the judge may upon cause shown grant a temporary stay, until the petition is approved or dismissed, of a prior pending bankruptcy, mortgage foreclosure or equity receivership proceeding and of any act or other proceeding to enforce a lien against a debtor's property, and may upon cause shown enjoin or stay until the petition is approved or dismissed the commencement or continuation of a suit against a debtor. (July 1, 1898, ch. 541, § 113, as added June 22, 1938, ch. 575, § 1, 52 Stat. 884.)

§ 514. Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication. (July 1, 1898, ch. 541, § 114, as added June 22, 1938, ch. 575, § 1, 52 Stat. 884.)

§ 515. Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature. (July 1, 1898, ch. 541, § 115, as added June 22, 1938, ch. 575, § 1, 52 Stat. 884.)

§ 516. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and

to such other parties in interest as the judge may designate; (2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable; (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and (4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor. (July 1, 1898, ch. 541, § 116, as added June 22, 1938, ch. 575, § 1, 52 Stat. 885.)

Section 148 (United States Code, 1940 Edition, Title 11, Section 548):

Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property. (July 1, 1898, ch. 541, § 148, as added June 22, 1938, ch. 575, § 1, 52 Stat. 888.)

Sections 186 and 187 (United States Code, 1940 Edition, Title 11, Sections 586 and 587):

§ 186. A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed under

section 72 of this title would have. (July 1, 1898, ch. 541, § 186, as added June 22, 1938, ch. 575, § 1, 52 Stat. 892.)

§ 587. Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor. (July 1, 1898, ch. 541, § 187, as added June 22, 1938, ch. 575, § 1, 52 Stat. 892.)

Pertinent Massachusetts Statutes.

General Laws, Tercentenary Edition, Chapter 244, Section 1:

A mortgagee may, after breach of condition of a mortgage of land, recover possession of the land mortgaged by an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming it, or by action under this chapter; and possession so obtained, if continued peaceably for three years, shall forever foreclose the right of redemption. (1785, 22, § 2; R.S. 107, § 1; G.S. 140, § 1; P.S. 181, § 1; R.L. 187, § 1.)

General Laws, Tercentenary Edition, Chapter 244, Section 2:

If an entry for breach of condition is made without a judgment, a memorandum of the entry shall be made on the mortgage deed and signed by the mortgagor or person claiming under him, or a certificate under oath of two competent witnesses to prove the entry shall be made. Such memorandum or certificate shall within thirty days

after the entry, except as provided in section seventy of chapter one hundred and eighty-five, be recorded in the registry of deeds for the county or district where the land lies, with a note of reference, if the mortgage is recorded in the same registry, from each record to the other. Unless such record is made, the entry shall not be effectual for the purposes mentioned in the preceding section. (R.S. 107, § 2; G.S. 140, § 2; P.S. 181, § 2; R.L. 187, § 2.)

General Laws, Tercentenary Edition, Chapter 244, Section 3:

The mortgagee in an action for possession may declare on his own seisin, stating that it is in mortgage; and if the court finds upon verdict or otherwise that the plaintiff is entitled to possession of the land for breach of condition, it shall upon motion of either party, except as provided in the following section, award a conditional judgment. (1698, 22, § 1; 1785, 22, § 1; R.S. 107, § 3; 1852, 312, § 2, cl. 10; G.S. 140, § 3; P.S. 181, § 3; R.L. 187, § 3.)

General Laws, Tercentenary Edition, Chapter 244, Section 4:

Unless the defendant is the mortgagor or his assignee, or entitled to hold or claim the land under the mortgagor or his assignee, he shall not redeem the land nor have a conditional judgment, except with the consent of the plaintiff, but the action shall be conducted like a writ of entry, and in all cases the judgment for the plaintiff may be entered for possession as at common law, unless one or the other of the parties moves for the conditional judgment. (R.S. 107, § 4; G.S. 140, § 4; P.S. 181, § 4; R.L. 187, § 4.)

General Laws, Tercentenary Edition, Chapter 244, Section 5:

If the conditional judgment is to be entered, the court shall determine the amount due to the plaintiff on the mortgage, and shall enter judgment that if the defendant within two months after the judgment pays to the plaintiff such amount with interest and the costs, the mortgage shall be void, and the defendant shall hold the land discharged thereof; otherwise, that the plaintiff shall have execution for possession and for costs. (1698, 22, § 1; 1785, 22, § 1; R.S. 107, § 5; G.S. 140, § 5; P.S. 181, § 5; R.L. 187, § 5.)

General Laws, Tercentenary Edition, Chapter 244, Section 14:

The mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, do all the acts authorized or required by the power; but no sale under such power shall be effectual to foreclose a mortgage, unless previous to such sale, notice thereof has been published once in each of three successive weeks, the first publication to be not less than twenty-one days before the day of sale, in a newspaper, if any, published in the town where the land lies. If no newspaper is published in such town, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such town, city or county, and having a circulation therein, shall be sufficient for the purpose. (1857, 229, § 1; G.S. 140, § 42; 1877, 215;

P.S. 181, § 17; 1882, 75; R.L. 187, § 14; 1906, 219, § 1; 1912, 360, § 1; 1918, 257, § 439; 1919, 5; 1920, 2.)

General Laws, Tercentenary Edition, Chapter 244, Section 15:

The person selling, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such person, shall, within thirty days after the sale, cause a copy of the notice and his affidavit, fully and particularly stating his acts, or the acts of his principal or ward, to be recorded in the registry of deeds for the county or district where the land lies, with a note of reference thereto on the margin of the record of the mortgage deed, if it is recorded in the same registry. If the affidavit shows that the requirements of the power of sale and of the statute have in all respects been complied with, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed. (1857, 229, § 1; G.S. 140, §§ 42, 43; P.S. 181, § 18; R.L. 187, § 15; 1906, 219, § 2; 1915, 23.)

General Laws, Tercentenary Edition, Chapter 244, Section 17:

A sale or transfer by the mortgagor shall not impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the land as attorney or agent of the mortgagor. (G.S. 140, § 39; P.S. 181, § 20; R.L. 187, § 17.)



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IN THE

Supreme Court of the United States

October Term, 1942.

No. 941.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, Petitioner,

v.

THOMAS J. CASEY, Trustee, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION
TO WRIT OF CERTIORARI

THOMAS J. CASEY, Trustee,
Pro se.

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JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, Petitioner,

v.

THOMAS J. CASEY, Trustee, Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI.

Opinions of the Courts Below.

The memorandum of decision for injunction entered in the District Court September 16, 1942, is set forth in the record at page 42. The orders of the District Court dated September 16, 1942, appealed from are set forth in the record at pages 22 to 24, inclusive, and the order for turn over dated September 17, 1942, appealed from is set forth in the record at page 41 and the opinion of the Circuit Court of Appeals for the First Circuit dated March 1, 1943, is set forth in the record at pages 51 to 53, inclusive.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the Bankruptcy

Act, United States Code, 1940 Edition, Title 11, Section 47 C, and under Section 240 of the Judicial Code as amended, United States Code, 1940 Edition, Title 48, Section 347.

Questions Presented.

The questions presented on the record in the case at bar are whether the Circuit Court of Appeals erred in holding the following:

1. That the District Court after approval of a petition under Chapter 10 of the Chandler Act 52 Stat. 840, 11 U. S. C. A., has power to take possession of mortgaged premises, collect the rents and enjoin the mortgagee from interfering therewith by foreclosure or otherwise.
2. That the District Court had properly exercised that power in these proceedings.
3. That the property of the debtor was in *custodia legis* as of the date of the filing of the petition.
4. That possession and collected rents should be turned over to the trustee.
5. That the constitutional rights of the mortgagee under its Massachusetts form of mortgage were not impaired by the orders of the Court but were suspended for the time being for the purposes of the act.

Statutes and Regulations Involved.

Pertinent Sections of the Chandler Act.

Sections 256 and 257 (United States Code, 1940 Edition, Title 11, Sections 656 and 657):

§256. A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States or of any State in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made. (July 1, 1898, ch. 541, §256, as added June 22, 1938, ch. 575, §1, 52 Stat. 902.)

§657. The trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession, the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee or debtor in possession shall also have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage. (July 1, 1898, ch. 541, §257, as added June 22, 1938, ch. 575, §1, 52 Stat. 902.)

Sections 111 to 116 (United States Code, 1940 Edition, Title 11, Sections 511 to 516):

§511. Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located. (July 1, 1898, ch. 541, §111, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§512. Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication. (July 1, 1898, ch. 541, §112, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§513. Prior to the approval of a petition, the judge may upon cause shown grant a temporary stay, until the petition is approved or dismissed, of a prior pending bankruptcy, mortgage foreclosure or equity receivership proceeding and of any act or other proceeding to enforce a lien against a debtor's property, and may upon cause shown enjoin or stay until the petition is approved or dismissed the commencement or continuation of a suit against a debtor. (July, 1898, ch. 541, §113, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§514. Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication. (July 1, 1898, ch. 541, §114, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§515. Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature. (July 1, 1898, ch. 541, §115, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§516. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—(1) permit the rejection of executory contracts of the debtor, except contracts in the public

authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate; (2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable; (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and (4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor. (July 1, 1898, ch. 541, §116, as added June 22, 1938, ch. 575, §1, 52 Stat. 885.)

Section 148 (United States Code, 1940 Edition, Title 11, Section 548):

Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property. (July 1, 1898, ch. 541, §148, as added June 22, 1938, ch. 575, §1, 52 Stat. 888.)

Sections 186 and 187 (United States Code, 1940 Edition, Title 11, Sections 586 and 587):

§186. A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed

under section 72 of this title would have. (July 1, 1898, ch. 541, §186, as added June 22, 1938, ch. 575, §1, 52 Stat. 892.)

§587. Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor. (July 1, 1898, ch. 541, §187, as added June 22, 1938, ch. 575, §1, 52 Stat. 892.)

Statement.

Supplementing the statement of the petition the following facts should be called to the attention of the Court:

That from November 1, 1940, the date of the purchase of the hotel known as the Hotel Buckminster from the petitioner until August 1, 1942, all payments under the terms of the mortgage hereinbefore referred to had been met and on August 5, 1942 the date of the filing of the petition the only payment under the terms of the mortgage that was in arrears was the payment due August 1, 1942. That at the time of the filing of the petition, the debtor had paid off \$37,000.00 from the purchase price and had improved the property at considerable expense establishing a substantial equity in the premises. That negotiations were under way for the determination of a rental to be paid by the United States of America for the premises for its use by the United States Army. That the income to be derived under the present offer from the United States of America for the use of such portion of the premises now occupied

by it is \$40,000.00 per year. The Yankee Network, tenants of the debtor under a lease, pays \$13,000.00 per year as rent and the Gulf Oil Company is under an agreement to pay \$4,000.00 per year as rent for the use of a portion of the roof for advertising purposes making a total yearly income of \$57,000.00. Under the terms of the petitioner's mortgages the debtor is obliged to pay a sum not exceeding \$37,000.00 per year which sum includes taxes, interest, and the principal payment under the terms of the mortgage held by the petitioner. This leaves the sum of \$20,000.00 net per year which is available for the payment to creditors and to defray administrative expenses.

On April 12, 1943, the debtor's plan for reorganization was filed which plan provided for:

1. The payment of all mortgage obligations which are in arrears bringing them up to date according to the terms of said mortgage.
2. The payment of all other debts in cash and in full payable 5% the first of each and every month until 100% is paid.
3. Upon final confirmation of the plan by the Court, the entire provisions of the plan will be carried out within sixty days of such confirmation. Such confirmation, however, will be predicated upon the completion of the litigation now pending before the United States District Court for the District of Massachusetts, the Circuit Court of Appeals for the First Circuit and the United States Supreme Court between John Hancock Mutual Life Insurance Company and Thomas J. Casey, trustee of the debtor corporation.

Argument.

I.

The decision in the instant case is not in conflict with the fundamental principles of the Bankruptcy Act prior to the Chandler Act.

It is contended by the respondent that even under the Federal Bankruptcy Act of 1898, section 70 a, "the trustee of the estate of a bankrupt, upon his appointment and qualification . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt,— (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial processes against him" It must be conceded that at the time of the filing of the petition the debtor had such title as was subject to levy and which could have been sold under judicial process against it and which could have been conveyed by deed.

The question of title must be distinguished from possession and right to possession. It is elementary bankruptcy law and practice that the trustee is entitled to possession of such property as was in the possession of the bankrupt at the time of the filing of the petition. The trustee derives this right from the doctrine *custodia legis* "the exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the filing of the petition" and that is the case of *Acme Harvester Co. vs. Beekman Co.*, 222 U. S. 300, 56 L. Ed. 208, 32 S. Ct. 96, 27 A. B. R. 262; *Stratom vs. New*, 283 U. S. 318, 75 L. Ed. 1060, 51 S. Ct. 465, 17 A. B. R. (N. S.) 630; *Farmers and Mech.*

Nat. Bank vs. Wilkinson, 295 Fed. 120, 2 A. B. R. (N. S.) 360 (C. C. A. Tex.). To permit a mortgagee to disturb the possession of the Court by the attempted exercise of a right under "power of sale" contained in a mortgage or the attempted taking of possession or the taking of possession without the permission of the Court would be in derogation of the powers of the Court under the doctrine of *custodia legis*. It is fundamental law that governs the right held by one in possession or one having the right to possession to collect rents and profits. *Matter of Bush Terminal Co.*, V. 28 (N. S.), p. 216. *Matter of Associated Gas & Electric Co.*, V. 30 (N. S.), p. 12. *Matter of Nineteenth and Walnut Streets Corp.*, V. 27 (N. S.) p. 321. *Matter of Grand Boulevard Investment Co. v. Strauss*, V. 29 (N. S.).

The determination by the Circuit Court of Appeals herein that the property of the debtor was *in custodia legis* and that the trustee was entitled to possession and entitled to collect the rents were fully authorized by Sections 256 and 257 of the Act which was enacted after the decision of *Tuttle vs. Harris*, 297 U. S. 225, under old 77-B. The orders staying the foreclosure proceedings were amply supported by authority of Sections 111-116 inclusive.

The question of the constitutionality of the powers of the Bankruptcy Court as set forth in former Section 207 of the Act was conclusively determined *In re: New Rochelle Coal & Lumber Co.*, 28 A. B. R. (N. S.) 658; C. C. A., N. Y. 1935, 77 F. (2nd) 881, in which it said, "Former section 207 is constitutional and includes debtor, who, though unable to pay promptly, might be able to pay if time were sufficiently extended." *In re: Brockett v. Winkle Terra Cotta Co.*, C. C. A. Mo. 1936; 81 F. (2nd) 949, 30 A. B. R. (N. S.) 381, it was held; "Under former section 207 it was said that Congress

was not prohibited from impairing obligations of contracts under bankruptcy power, notwithstanding that bankruptcy power was subject to the 5th Amendment, also *In re: Cheney Bros.*, D. C. Conn. 1935, 12 F. Supp. 605; 30 A. B. R. (N. S.) 734. Former section 207 within power granted Congress by bankruptcy clause; Constitution, Art. 1, S. 8, Cl. 4. *Grand Boulevard Investment Co. v. Strauss*, C. C. A. Mo., 1935, 78 F. (2nd) 180; 29 A. B. R. (N. S.) 188.

II

The obvious difference that exists between the old bankruptcy act and the present Chandler Act is that the old bankruptcy act was aimed at the collection of the assets of the bankrupt and the liquidation of such assets and the distribution of such funds obtained in liquidation amongst the creditors of the bankrupt. The intent and purpose of the administration of the assets of a corporation in proceedings for reorganization under Chapter 10 of the Chandler Act is to collect the assets of the debtor corporation and to provide for a reorganization, the ultimate goal of which is to provide the creditors with a greater dividend in the assets of the debtor than that which might be obtained under liquidation and to preserve and rehabilitate the business of the debtor so that it may remain in business and continue as a benefit and an asset to the community as a whole. To effect the goal of reorganization under Chapter 10 of the Chandler Act, the Court was necessarily clothed with greater and far-reaching authority to prevent possible inequities which might occur when a secured creditor would foreclose on its security the effect of which foreclosure would put the debtor out of business and wipe out any possibility of unsecured creditors sharing in the assets of the debtor corporation. In the present matter the mortgages of the

petitioner have as security all of the real property and personal property and the exercise of the "power of sale" contained in these mortgages would effect a result diametrically opposed to the intent and purpose of the Chandler Act. The Honorable Mr. Justice Healey of the District Court for the District of Massachusetts expressed his desire after investigation that the creditors of all classes be paid one hundred cents on the dollar. That the efforts of the trustee and the attorney for the debtor corporation have been strained to accomplish the desire of the Court. That in furtherance of this desire the original offer by the United States Government for the use of the premises of the debtor corporation was raised from the original bid of \$23,000.00 to \$28,000.00 to \$34,000.00 and then to \$40,000.00 per year. That costs of administration were held down to an absolute minimum to make possible the offer of one hundred cents on the dollar to all creditors of all classes.

The District Court and the Circuit Court of Appeals recognized that the security of the petitioner has not been impaired by the granting of an injunction preventing the exercise of the "power of sale" contained in the mortgage hereinbefore mentioned but that the injunction suspended temporarily such "power of sale" for the purposes of the Act.

There is at the present moment sufficient cash in possession of the United States District Court for the District of Massachusetts and in possession of Thomas J. Casey, Esquire, trustee of the debtor corporation to immediately pay to the petitioner the arrears in taxes, interest, and principal payment at present due under the terms of the mortgages as aforesaid.

III.

The reasoning of the Circuit Court of Appeals is not in conflict with the law appertaining to Chapter 10 of the Chandler Act. The law cited in the petitioner's brief has reference to the administration of bankrupt estates prior to the passage of the Chandler Act but such interpretations as had been made subsequent to the passage of the Chandler Act are uniformly in support of the action of the District Court and the Circuit Court of Appeals. The reasoning of the Circuit Court of Appeals was soundly supported by Sections 256 and 257 and Sections 111 to 116 inclusive together with the fundamental proposition that property or property rights of the debtor are *in custodia legis* as of the time of the filing of the petition.

IV.

The case at bar presents no issue of general importance. The petitioner argues:

1. That the decision of the Court below raises a question as to the interpretation of chapter 10 of the Bankruptcy Act where the interest of the mortgagee in title jurisdictions are involved.
2. That there is a serious question as to the constitutionality of the Chandler Act as applied in the present case.
3. That there exists a confusion and diversity as to the proper interpretation of the Chandler Act.
4. That there has been a misinterpretation or improper application of decisions of the Supreme Court by the Circuit Court of Appeals in the present case.

The proposition of reorganization of a corporation under Chapter 10 of the Chandler Act taken in the light of the intent and purposes of the Act together with a thorough understanding of the economic dislocation from which business was suffering at the time of the passage of this Act refutes any contention that the Courts below erred in its interpretation or application.

In the light of recent decisions rendered under Chapter 10 of the Chandler Act, there is no issue presented by the case at bar of general importance.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals upholding the findings of the District Court were correct and in accord with established precedent. The petitioner has had a careful review of its contentions and there does not exist any occasion for further review by this Court. There is no conflict of decisions nor even a conflict of reasoning. Nor is the question of the right of Congress to pass legislation, the effect of which will suspend temporarily, a contractual right for the common good. No broad or doubtful question of great moment is presented for settlement. It is accordingly submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS J. CASEY, *Trustee.*
Pro se.